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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

THE FLORIDA BAR,
Petitioner,
v.
G. STEWART MCHENRY; WENT FOR IT, INC.; and JOHN T. BLAKELY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE THE MEDIA INSTITUTE, THE FREEDOM OF EXPRESSION FOUNDATION AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

This Brief is submitted on behalf of The Media Institute, The Freedom of Expression Foundation and The Thomas Jefferson Center for the Protection of Free Expression. They submit this Brief to protect the right to disseminate, and the public's right to receive, truthful commercial speech about lawful products and services. All *amici* have a lengthy history of advocacy for strong First Amendment protection for all speech, including truthful, non-misleading commercial messages. *Amici* have individually, or joined by others, participated as

amicus curiae in commercial speech cases before the Supreme Court of the United States, the Courts of Appeals, and the District Courts.

The Media Institute is an independent, non-profit research organization. Through conferences, publications, and filings with courts and regulatory bodies, the Institute advocates a strong First Amendment, competition within the communications industry, and journalistic excellence.

The Freedom of Expression Foundation is a non-profit corporation, organized in the District of Columbia, which sponsors and conducts research, disseminates information, and seeks to influence policy concerning freedom of expression in communications media.

The Thomas Jefferson Center for the Protection of Free Expression is a non-profit, non-partisan organization in Charlottesville, Virginia, affiliated with the University of Virginia, devoted solely to safeguarding freedom of speech and press in all forms.

SUMMARY OF ARGUMENT

Petitioner asks this Court to reverse 17 years of its jurisprudence protecting lawyers' commercial speech under the First Amendment. That request is deeply troubling under the doctrine of *stare decisis*, and even more so as an attack on the constitutional principle that protects all commercial speech—the principle that our citizens will perceive their own best interests if only commercial speakers are allowed to communicate their truthful, non-misleading messages without governmental interference. Regrettably, Petitioner advocates censorship.

Petitioner's Rule 4-7.4(b) prohibits members of the Florida bar from communicating in writing with potential clients concerning an action for personal injury or wrongful death within the 30 days following the accident or disaster (the "Rule"). Bar and Judiciary Rules, Fla. Stat. Ann. R. 4-7.4(b) (West 1994) ("R. 4-7.4(b)"). Although

the asserted purpose of the Rule is the protection of the personal privacy and tranquility of accident victims or their families, it is clear that Petitioner actually was motivated by the public's general dissatisfaction with lawyers, as reflected by its reliance on an opinion survey taken of Florida adults. Petitioner has done the public a disservice, however, by scapegoating attorney solicitation letters, which are marked in red as an "advertisement" and readily tossed in a wastebasket, as the key to rehabilitating the public's perception of lawyers. Unfortunately, it is easier to target speech than to tackle the real problems with the legal system, such as the oversupply of lawyers, the expense of litigation, the debate concerning contingency fees, and the unfortunate decline in civility. In any event, the First Amendment does not permit such cavalier restrictions on one of our most basic freedoms.

This Court has constructed a four-prong test that any governmental entity must satisfy before it can restrict commercial speech. Originally set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*"), that test requires Petitioner to prove with admissible evidence that it has a substantial interest in restricting speech, that the harms it identifies are real and will be alleviated directly and materially by its restriction, and that the scope of its restriction is narrowly tailored to its asserted purpose. On these cross-motions for summary judgment, Petitioner failed to create a record that satisfies any of these requirements.

Apparently recognizing its failure of proof, Petitioner makes the radical suggestion that the Court overrule its uninterrupted line of decisions that have placed lawyer advertising squarely within the commercial speech doctrine. According to Petitioner, State bar regulators, not the First Amendment, should determine the extent of lawyers' speech rights because lawyers serve a "public function." Petitioner's reasoning is flawed for numerous rea-

sons. Most important, its acceptance by this Court would cut a gaping hole in the First Amendment through which all sorts of speech would fall to reduced levels of protection.

Finally, Petitioner, seeking another way around *Central Hudson*, argues that its Rule is in fact a reasonable time, place or manner restriction. However, Petitioner does not satisfy any of the three elements necessary to such a finding: content neutrality; direct advancement of a substantial interest; and reasonable alternative avenues of communicating with recent accident victims.

The commercial speech doctrine, as applied by this Court since 1976, must uniformly protect all commercial speech or be put at risk of being dismantled piece by piece. Petitioner has failed to justify its censorship of truthful, non-misleading commercial speech under this Court's established standards. The Eleventh Circuit's well-reasoned decision should be affirmed.

ARGUMENT

I. PETITIONER HAS NOT MET THE SUBSTANTIAL BURDEN OF PROOF IMPOSED ON WOULD-BE REGULATORS OF COMMERCIAL SPEECH

A. Commercial Speech, Including Lawyer Advertising, Is A Valued Part Of The National Discourse And Receives Vigorous Constitutional Protection

Eighteen years ago, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) ("*Virginia Pharmacy*"), this Court recognized that the First Amendment protects commercial speech. One year later, the Court held that constitutional protection of lawyer advertising "flow[s] *a fortiori*" from the principles announced in *Virginia Pharmacy*. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 365 (1977) ("*Bates*"). Petitioner's attack today on lawyer advertising must be understood as a threat to the constitutional principles that protect all commercial speech.[1]

Protection of commercial speech stems from recognition of its unique role in the development of consumer awareness in a free enterprise economy. *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) ("*Edenfield*"); *Virginia Pharmacy*, 425 U.S. at 761-62. Contrary to Petitioner's repeated denigration of the constitutional value of advertising, "the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Bates*, 433 U.S. at 364. Thus, the goal of the commercial speech doctrine is to expand the realm of expression in the belief that " 'people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them. . . .' " *Central Hudson*, 447 U.S. at 562 (citation omitted); *see Edenfield*, 113 S. Ct. at 1798.

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[1] **The terms "lawyer advertising" and "lawyer solicitation" are used interchangeably in this Brief.**

These constitutional principles apply with no less force to advertising for legal services. As Justice Stevens observed in *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990) ("*Peel*"), the government's authority to restrict lawyers' commercial speech "is necessarily constrained by the First Amendment to the Federal Constitution, and specifically by the principle that disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information." *Id.* at 108 (*citing Virginia Pharmacy*, 425 U.S. at 770). From a constitutional perspective, lawyer advertising is indistinguishable from other forms of commercial speech: "[p]rophylactic restraints that would be unacceptable as applied to commercial advertising generally are therefore equally unacceptable as applied to [lawyer] advertising." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646-47 (1985) ("*Zauderer*").

The government may not censor a particular commercial message because some members of the population believe the message to be of slight worth. *Edenfield*, 113 S. Ct. at 1798. "Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price." *Virginia Pharmacy*, 425 U.S. at 765. More to the point, the fact that some people might find lawyer advertising offensive or beneath the dignity of the bar cannot justify suppressing it. *Zauderer*, 471 U.S. at 648; *see Bates*, 433 U.S. at 368-72.

When government restricts commercial speech, the courts must conduct a searching review of governmental ends and means. Courts cannot unquestioningly accept "merely rational legislative judgments" that censor commercial speech because "democracy stands on a stronger footing when courts protect First Amendment interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 519 (1981) ("*Metromedia*") (plurality opinion). Similarly, when lawyer advertising is restricted, the First Amendment forbids the courts from simply deferring to a State bar entity such as Petitioner. *Peel*, 496 U.S. at 108 (plurality opinion); *see Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion) (stressing that, in First Amendment cases, "deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law' " (citations omitted)).

This Court has crafted a four-prong test that the government must satisfy before it can restrict commercial speech. Petitioner conspicuously omits a full statement of this test from its Brief, perhaps because it failed to create a record based on admissible evidence that could possibly sustain its burden of proof. The test was originally set forth in *Central Hudson*, 447 U.S. at 564:

> (1) If the communication is neither misleading nor related to unlawful activity, . . .
>
> (2) the [government] must assert a substantial interest, [and]
>
> [t]he limitation on expression must be designed carefully to achieve the [government]'s goal. Compliance with this requirement may be measured by two criteria:
>
> (3) the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose[;]
>
> (4) if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

If the government cannot satisfy the second, third and fourth prongs of this test, a restriction on commercial speech cannot pass constitutional muster. *Id.* at 566; *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472 (1988) ("*Shapero*").

In the past two years, this Court has rigorously applied the *Central Hudson* test in two professional solicitation cases—cases that, inexplicably, never appear in Petitioner's Brief. *Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084 (1994) (*"Ibanez"*); *Edenfield*, 113 S. Ct. 1792. In both *Ibanez* and *Edenfield*, the Court emphasized the high constitutional value of commercial speech, the heavy burden on the government to come forward with specific evidence to satisfy the *Central Hudson* test, and the independent role of the judiciary in reviewing that evidence. *Ibanez*, 114 S. Ct. at 2086, 2088-89; *Edenfield*, 113 S. Ct. at 1800.

Not surprisingly, government regulators have usually failed to satisfy the demanding *Central Hudson* test in their attempts to restrict the truthful, non-misleading commercial speech of lawyers. Indeed, government has prevailed in only one of the seven cases involving non-misleading lawyer solicitation that have been decided by this Court since recognition of the commercial speech doctrine.[2]

Confronted with this history of failed attempts to restrict non-misleading lawyer solicitation, Petitioner mischaracterizes the Court's decisions as being based not on the *Central Hudson* test but a *sub silentio* test that prohibits all restrictions on lawyer solicitation unless it is misleading or conducted in-person. Petitioner's Brief at 13. To the contrary, the Court consistently has applied the *Central Hudson* test to reject certain specific restrictions on lawyers' commercial speech because the burden of proof on would-be regulators is "not slight," *Ibanez*, 114 S. Ct. at 2089, and has not been met by Petitioner's predecessors in censorship. Similarly, Petitioner cannot satisfy the *Central Hudson* test with a "record so bare" as the one on which it relies here. *See id.* at 2091.

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[2] *Compare Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (*"Ohralik"*) *with Bates*, 433 U.S. 350; *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer*, 471 U.S. 626; *Shapero*, 486 U.S. 466; *Peel*, 496 U.S. 91; and *Ibanez*, 114 S. Ct. 2084.

B. Petitioner Has Failed To Identify A Substantial Interest Or Develop An Evidentiary Record That Satisfies *Central Hudson*

1. *Petitioner Has Not Identified a Substantial Interest That Justifies Its Restriction*

a. *All Protected Speech Is Endangered by Petitioner's Asserted "Substantial Interest" in Protecting a Purportedly "Vulnerable" Audience from Commercial Messages*

In its attempt to satisfy the second prong of the *Central Hudson* test, Petitioner describes a supposed "substantial interest" that, if accepted, would threaten all constitutionally protected speech. According to Petitioner, it has a substantial interest in keeping a particular message from certain adults because Petitioner believes they cannot handle the message. More specifically, Petitioner asserts that recent accident victims are "most vulnerable," Petitioner's Brief at 27, and their "personal privacy and tranquility" will be unduly disturbed by attorney solicitation letters.[3] *Id.* at 25.

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[3] This Court's analysis under the second prong is limited to the purported substantial interest asserted by Petitioner. "Unlike rational basis review, the *Central Hudson* standard does not permit [the Court] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 113 S. Ct. at 1798. Petitioner identifies only the protection of "personal privacy and tranquility" as its purported substantial interest under *Central Hudson*.

In an unrelated context, Petitioner asserts that the States have a "substantial interest in maintaining the professionalism of the bar and public confidence in the administration of justice." Petitioner's Brief at 7. This assertion was not made below, and, in any event, has been thoroughly rejected as a sufficient interest to satisfy the second prong. *Bates*, 433 U.S. at 368-72, 375-77.

Notably, not one of Petitioner's supporting *amici* argues that the Rule can be upheld on the basis of the purported substantial interest identified by Petitioner. Instead, those *amici* concoct various interests that, because they are not asserted by Petitioner,

Petitioner's "vulnerable audience" argument is antithetical to the commercial speech doctrine: "the general rule is that *the speaker and the audience, not the government,* assess the value of the information presented." *Edenfield,* 113 S. Ct. at 1798 (emphasis supplied). Moreover, even if the particular commercial message is offensive to some adults, that does not empower the government to deprive commercial speakers of their right to communicate with other adults through truthful, non-misleading speech. *Zauderer,* 471 U.S. at 648.

Petitioner's focus on the purported vulnerability of the recipients of the subject speech poses special dangers for the First Amendment. In our "victim" culture, people are increasingly prone to shift responsibility for their own conduct to others. People with eating disorders blame fashion advertisers, parents blame television programmers for their children's violent behavior, and "shopaholics" blame all advertisers. Under Petitioner's reasoning, the government can censor virtually any form of speech by claiming to act in the name of such purportedly vulnerable people. But just as the First Amendment puts faith in individual Americans, not government, to determine the value of protected speech, *Edenfield,* 113 S. Ct. at 1798, so too must American citizens assume responsibility for accepting, rejecting or simply disregarding that speech without a governmental filter. Similarly, government cannot be permitted to assert the hypothetical or even actual sensitivities of certain people as a backdoor justification for banning truthful, non-misleading speech. *See Texas v. Johnson,* 491 U.S. 397, 414 (1989).

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are irrelevant under *Central Hudson*. *Edenfield,* 113 S. Ct. at 1798. A particularly insufficient interest is suggested in the Brief of the Association of Trial Lawyers of America ("ATLA")—a group consisting primarily of plaintiffs' personal injury lawyers. ATLA favors Petitioner's Rule because it believes that lawyer advertising results in lower jury awards, and, implicitly, lower compensation for ATLA's members. The First Amendment, however, does not allow speech to be restricted because certain lawyers would like to make more money.

In *Shapero,* the Court firmly rejected the argument that commercial speech can be restricted where the government believes certain consumers cannot handle the message. 486 U.S. 466. In overruling the lower court's decision that upheld a ban on targeted, direct-mail solicitation by lawyers, the Court held that:

> Of course, a particular potential client will feel equally "overwhelmed" by his legal troubles and will have the same "impaired capacity for good judgment" regardless of whether a lawyer mails him an untargeted letter or exposes him to a newspaper advertisement—concededly constitutionally protected activities—or instead mails a targeted letter. The relevant inquiry is not whether there exist potential clients whose "*condition*" makes them susceptible to undue influence, but whether the *mode of communication* poses a serious danger that lawyers will exploit any such susceptibility.

Id. at 474 (emphasis supplied).

b. *Petitioner Does Not Have a Substantial Interest in Banning Targeted Solicitation Letters, Especially Given Their Value to Lawyers and Their Usefulness to Consumers*

The relevant inquiry here is not whether the "condition" of recent accident victims is such that they must be protected from targeted solicitation letters, but whether that mode of communication gives rise to a substantial governmental interest in protecting the "personal privacy and tranquility" of the injured victims or their families. *See id.* This precise issue was resolved in favor of protecting speech in *Shapero*:

> Nor does a targeted letter invade the recipient's privacy any more than does a substantially identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs,

> not when he confronts the recipient with the discovery.

Id. at 476.[4]

Indeed, the very nature of letters makes it highly unlikely that they will disturb the personal privacy and tranquility of recipients in a constitutionally cognizable manner under the second prong of *Central Hudson*. As held in *Shapero*, "[a] letter, like a printed advertisement (but unlike a lawyer), can readily be put in a drawer to be considered later, ignored or discarded."[5] *Id.* at 475-76. Similarly, as the Court stated in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1982) ("*Bolger*"), "the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* at 72 (citation omitted) (invalidating restriction on direct mail advertising for contraceptives). Moreover, as Petitioner concedes in its Comment to the Rule, those Florida citizens who do not want to consider lawyer solicitations could simply discard the letters without reading them, as the Rule requires all such envelopes and letters to be stamped in red with the word "advertisement." *The Florida Bar: Petition to Amend the Rules Regulating the Florida Bar—Advertising Issues*, 571 So. 2d 451, 468 (Fla. 1990) ("*The Florida Bar: Petition to Amend*"); *see Shapero*, 486 U.S. at 477.

The insubstantiality of Petitioner's asserted interest in restricting this particular type of speech is underscored

[4] *Cf. id.* at 475 (describing *Ohralik*, 436 U.S. 447, as upholding a ban on in-person solicitation by lawyers because of the "potential for overreaching and undue influence" inherent in that "mode of communication"); *Edenfield*, 113 S. Ct. at 1802 (explaining "that *Ohralik*'s holding was narrow and depended upon certain 'unique features of in-person solicitation of lawyers' that were present in the circumstances of that case").

[5] The *Shapero* court's reasoning applies here regardless of the Rule's 30-day limitation, as that limitation does not alter the mode of communication, *i.e.*, targeted solicitation letters.

by its value both to lawyers and the intended recipients of their letters. Although the value of a particular truthful commercial message is irrelevant to its unalterable status as constitutionally protected speech, *see Edenfield*, 113 S. Ct. at 1798, it is relevant to whether the government has a substantial interest in suppressing that message, *see, e.g., Bates*, 433 U.S. at 369-70.

The speech banned by Petitioner is highly valuable to many members of the Florida bar who represent plaintiffs in personal injury and wrongful death actions. Petitioner lacks any legitimate interest in limiting the right of those lawyers to truthfully communicate with potential clients about their professional skills and experience. *See Bates*, 433 U.S. at 364. The fact that lawyers, like most working people, are motivated by the desire to earn a living does not reduce their entitlement to First Amendment protection. To the contrary, solicitation has considerable value in large part because of that motivation: "[a] seller has a strong financial incentive to educate the market and stimulate demand for his product or service, so solicitation produces more personal interchange between buyer and seller than would occur if only buyers were permitted to initiate contact." *Edenfield*, 113 S. Ct. at 1797.

Moreover, the Rule has a discriminatory economic and speech impact on a certain class of lawyers for whom the banned speech is particularly valuable. As Justice Marshall stated in *Ohralik*, restrictions on attorney solicitation "fall most heavily on those attorneys engaged in a single-practitioner or small-partnership form of practice—attorneys who typically earn less than their fellow practitioners in larger, corporate-oriented firms." 436 U.S. at 475 (concurring opinion; citations omitted). These attorneys lack the reputation or connections that allow more established practitioners to attract business without advertising. The uneven economic impact of the Rule goes a long way toward explaining why various associations of

trial lawyers and bar associations have weighed in as *amici* on the side of Petitioner. Members of the legal establishment benefit economically from restrictions like Petitioner's Rule that limit the access of less-established lawyers to potential clients.

In addition to the right of lawyers to communicate the banned messages, recent accident victims may have a particularly pressing need for the censored information. As held in *Zauderer*, lawyer advertising that "tend[s] to acquaint persons with their legal rights who might otherwise be shut off from effective access . . . [is] . . . undoubtedly more valuable than many other forms of advertising." 471 U.S. at 646. Similarly, the Federal Trade Commission, in a report cited in *Peel* to emphasize the value of lawyer advertising, concluded that a "principal reason why consumers do not consult lawyers is because they do not know how to find a lawyer able to assist them with their particular problems." 496 U.S. at 110 n.18 (plurality opinion); *see Bates*, 433 U.S. at 370.

The value to potential clients of the lawyer advertising banned here was noted by Justice Shaw of the Florida Supreme Court, who wisely dissented from that Court's adoption of the Rule, in a passage quoted favorably by the Eleventh Circuit:

> This ban will effectively deprive many accident victims of information concerning the availability of professional legal assistance precisely when they need it most—during the initial period following a serious accident when they are confronted with an unintelligible legal tangle and demands to waive or compromise their rights. It is during this time that informed decisionmaking is crucial.

McHenry v. The Florida Bar, 21 F.3d 1038, 1043 n.12 (11th Cir.) ("*McHenry*") (citation omitted), *cert. granted*, 115 S. Ct. 42 (1994). Although all truthful, non-misleading commercial speech is constitutionally protected regardless of whether the government or the courts

believe it has any informational value, the Eleventh Circuit properly considered the high value of the speech banned by the Rule in finding that Petitioner had not satisfied the second prong of *Central Hudson*.

This Court cannot simply accept that Petitioner's asserted interest is substantial. Rather, " 'the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights [so vital to the maintenance of democratic institutions].' " *Metromedia*, 453 U.S. at 520 (citation omitted). The Eleventh Circuit correctly held that Petitioner has not identified a substantial interest in censoring truthful, non-misleading lawyer solicitation. Moreover, any interest that Petitioner might have is clearly rendered insubstantial by the usefulness to recent accident victims of information about legal representation and the right of lawyers to communicate with those individuals. Petitioner's failure to meet its burden under the second prong alone requires affirmance of the Eleventh Circuit's decision.

2. *Petitioner Also Failed to Submit Any Evidence to Demonstrate That Its Rule Directly and Materially Advances Its Asserted Purpose of Protecting Personal Privacy and Tranquility*

Neither can this Court find that Petitioner has met its burden of proof under the third prong without completely draining that prong of its power as a protector of speech. In *Edenfield*, the Court described the government's burden:

> This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech *must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.*

113 S. Ct. at 1800 (emphasis supplied). On these cross-motions for summary judgment, Petitioner absolutely failed to create a record that demonstrates (i) that the harms of disturbing the privacy and tranquility of recent accident victims are real rather than merely hypothetical or (ii) that a 30-day ban on lawyer solicitation letters will in fact directly and materially reduce any such harms.

The *Ibanez* decision illuminates Petitioner's failure to demonstrate that the asserted harms are real. There, the Florida Board of Accountancy ("Board") declared Ibanez guilty of, *inter alia,* using the designation "Certified Financial Planner" in a misleading manner. 114 S. Ct. at 2089. The Court found that the Board had not satisfied the third prong: "[g]iven 'the complete absence of any evidence of deception,' . . . the Board's 'concern about the possibility of deception in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment.' " *Id.* at 2090 (citations omitted); *see Edenfield,* 113 S. Ct. at 1803.

Similarly, Petitioner has not introduced any evidence that recent accident victims or their families believe that their privacy or tranquility is being disturbed by anything other than the unfortunate accident itself. The only "evidence" of any sort submitted by Petitioner on its cross-motion for summary judgment is its survey of Florida adults, and that survey speaks not at all to whether the purported harms are real. Moreover, the survey is not the type of evidence that could satisfy Petitioner's burden under the third prong, as it is no more than a collection of opinions about lawyer advertising, whereas *Central Hudson* requires the government to prove a causal connection between the restriction on speech and the alleviation of a real harm. *See Edenfield,* 113 S. Ct. at 1800.

Further, Petitioner has not demonstrated, as it must, that its Rule will protect the personal privacy and tranquility of recent accident victims in a direct and material way. *See id.* Like the Florida Board of Accountancy in

Edenfield, Petitioner "presents no studies" or "any anecdotal evidence, either from Florida or another State, that validates [Petitioner's] suppositions." *Id.* Indeed, Petitioner's other restrictions—unchallenged here—make it particularly unlikely that lawyer solicitation letters cause the asserted harm. Such letters (i) must not subject the recipient to coercion, duress, fraud, overreaching, harassment, intimidation or undue influence, (ii) must be marked in red with the word "advertisement" on the envelope and every page of the letter, (iii) must be sent by the United States mail only, (iv) must look like a letter, not a pleading or other legal document, and (v) must not reveal the nature of the recipient's legal problem on the outside of the envelope. *See McHenry,* 21 F.3d at 1040-41 n.6.

Moreover, the very reality of Petitioner's asserted purpose, let alone its material advancement, is belied by the fact that the Rule does not ban far more upsetting letters or communications from representatives of the potentially liable parties involved in the accident that pressure the recipients to waive or compromise their legal rights. Indeed, those representatives are free to contact recent accident victims in person, a mode of communication that this Court recognized in *Ohralik* has great coercive potential.[6] *See Shapero,* 486 U.S. at 475. *See generally Central Hudson,* 447 U.S. at 564 ("the regulation may not be sustained if it provides only ineffective or remote support

[6] The Rule also leaves intact an intrusion on recent automobile accident victims that is mandated by the State of Florida. Section 316.066 of Florida's traffic law requires the driver of any vehicle involved in an accident resulting in personal injury or death to submit a written accident report within five days unless the investigating officer does so. Fla. Stat. Ann. § 316.066 (West 1994). This requirement—which is much more disturbing than discarding an unopened envelope marked "advertisement"—casts substantial doubt on whether Petitioner's Rule could materially protect the tranquility of recent accident victims.

for the government's purpose"); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993) (regulation that had only "minute" or "paltry" effect did not materially advance statute's purpose).

Petitioner omits from its Brief any discussion of the third prong of *Central Hudson*. That omission is additionally fatal to Petitioner's case. The First Amendment places the burden of proof on all would-be regulators of speech, and that burden cannot be satisfied by silence. *See Zauderer*, 471 U.S. at 646.

3. *Petitioner Also Has Not Demonstrated That Its Rule Is Narrowly Tailored to Achieve Its Asserted Purpose*

In addition, Petitioner completely ignores its constitutional burden under the fourth prong of *Central Hudson*. That prong requires the government to demonstrate that its restriction is "no more extensive than necessary to serve" the asserted interest. *Ibanez*, 114 S. Ct. at 2088 (citation omitted). If a restriction on speech is overinclusive—if it bans speech having nothing to do with its purported purpose—then the restriction is impermissible under the fourth prong. *Central Hudson*, 447 U.S. at 570-71.

Petitioner's Rule is overinclusive because it covers speech directed toward recent accident victims who are unlikely to be particularly upset by lawyer solicitation letters. As the Eleventh Circuit noted, some of the potential clients will have suffered "relatively minor injuries" from a "simple slip and fall." *McHenry*, 21 F.3d at 1043 n.9. The Rule also prohibits communications with a potential client merely involved in a fender-bender with a resulting sore neck. Moreover, even among victims of serious accidents, many are more likely to welcome information about available legal services than to be disturbed by lawyer solicitation letters. Surely, if the fourth prong means anything, Petitioner's overinclusive ban cannot be deemed "in proportion to the interest served." *In re R.M.J.*, 455 U.S. at 203.

The primary decision on which Petitioner relies highlights the overinclusiveness of the Rule. *In re Anis*, 599 A.2d 1265 (N.J. 1991) ("*Anis*"), *cert. denied sub nom.*, 112 S. Ct. 2303 (1992). It must first be noted that Petitioner's description of *Anis* is grossly inaccurate. *Anis* did not involve "a restriction similar to Florida's." *See* Petitioner's Brief at 27. Rather, the restriction upheld in *Anis* is virtually identical to a regulation in Florida that is *not* being challenged here. Both jurisdictions prohibit written comunication with a potential client by a lawyer who knows or reasonably should know that the person's physical, emotional or mental state is such that the potential client could not exercise reasonable judgment in employing a lawyer. *Compare* 599 A.2d at 1268 *with* R. 4-7.4(b)(1)(F). Whereas the latter regulation was found to be narrowly tailored to restrict speech in only limited instances, Petitioner's Rule applies to all manner of communications without regard to the emotional state of the potential client.

By a remarkable coincidence, the *Anis* court, in a passage omitted by Petitioner, directly commented on the overinclusiveness of a restriction like Petitioner's:

> Would a truthful solicitation letter sent *fifteen or thirty days* after a tragic loss reach people when they are no longer emotionally weak or vulnerable? We cannot say with certainty, since our *assumptions* in such cases are largely untested. It may be that there are degrees of loss or suffering. Common sense tells us that the *mildly-injured survivors* of an overturned-bus incident might be less vulnerable than were the Lockerbie families. Hence, we attempt no permanent brightline rule in this opinion.

Anis, 599 A.2d at 1271 (emphasis supplied). In contrast to the rule reviewed by the *Anis* court, Petitioner's

Rule is a permanent brightline restriction on speech based on completely untested and unproven assumptions.

As this Court held in *Edenfield* concerning restrictions on commercial speech, " '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " 113 S. Ct. at 1803-04 (citation omitted). Petitioner has failed to carefully calculate the costs of its overinclusive Rule, and cannot be held to have satisfied the fourth prong.

In sum, Petitioner has not met its burden under the second, third or fourth prong of *Central Hudson*. Consequently, the Rule must be stricken as unconstitutional under the First Amendment.

II. LAWYER ADVERTISING IS INSEPARABLE FROM COMMERCIAL SPEECH GENERALLY AND MAY NOT RECEIVE REDUCED CONSTITUTIONAL PROTECTION

Unable to journey back in time to create a record or fashion an argument sufficient to justify its restriction on speech under *Central Hudson*, Petitioner instead asks this Court to turn back the clock on the commercial speech doctrine. That request must be rejected.

This Court's lawyer advertising cases have been at the heart of the commercial speech doctrine as it has developed during the past 18 years. Based on the principles flowing from those cases, commercial speech has matured into a strong, highly-protected component of the national discourse. Petitioner's demand that lawyer advertising be surgically excised from the body of commercial speech threatens that entire body.

Restrictions on lawyer advertising account for far more of this Court's commercial speech decisions than any other subject. The higher incidence of unconstitutional restrictions on lawyer advertising no doubt stems from the simple fact that, until the *Bates* decision in 1977, 433

U.S. 350, most States could and did completely ban lawyers' commercial speech. Unlike advertising for other products and services, lawyer advertising apparently has too short a history to be free of controversy, and remains unpopular with many adults.[7]

In our constitutional system, the unpopularity of speech calls not for censorship but for vigilant protection. As this Court held in *Texas v. Johnson*, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[8] 491 U.S. at 414 (*citing Bolger*, 463 U.S. at 65, 72; other citations omitted). In disregard of this principle, Petitioner argues that the First Amendment must be sacrificed to popular sentiment against lawyers and their advertising. Petitioner's Brief at 14-15.

Petitioner attempts to cloak its argument in States' rights, *id.* at 7, but clearly no State has the right to violate the Federal Constitution. As explained in *Peel*, deference

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[7] While Petitioner bemoans the *Bates* decision as "thrust[ing] aside centuries of Anglo-American law defining the role of the lawyer in our system of justice," Petitioner's Brief at 9, the traditonal ban on lawyer advertising stemmed not from ethics, but the elitist etiquette of early lawyers who "looked down on 'trade' as unseemly." *Bates*, 433 U.S. at 371 (citation omitted).

[8] The strength of this "bedrock principle" against censorship is illustrated powerfully by *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (*"R.A.V."*). There, the Court considered a content-based ban on "fighting words," one of the few categories of speech that may be entirely proscribed on the basis of content. *Id.* at 2542-43 (plurality opinion). Nonetheless, the Court invalidated the challenged ban by applying a "strict scrutiny" test. *Id.* at 2549-50 (plurality opinion). Although *amici* feel constrained by precedent to analyze Petitioner's Rule under *Central Hudson*, they respectfully invite the Court to consider, in light of *R.A.V.*, whether content-based restrictions on commercial speech—a category of speech higher in the hierarchy of constitutional protection than "fighting words," *id.* at 2564 (concurring opinion)—should also be protected by a "strict scrutiny" test.

to the States in the area of lawyer advertising is inappropriate as it "would create radical disparities in First Amendment protections from State to State." 496 U.S. at 108 n.16 (plurality opinion). Unlike State regulation of health care or welfare reform, there is simply no room for the "experimentation and innovation" advocated by Petitioner where constitutional rights are at stake. *See* Petitioner's Brief at 24.

In support of its "States' rights" argument, Petitioner essentially claims that the States have an extra-special interest in lawyer advertising because it is part of a "public function," and that interest takes lawyer advertising out of the First Amendment. Petitioner's Brief at 17-23. But Petitioner's two explanations for its asserted "public function" rationale cannot withstand scrutiny. First, Petitioner contends that constitutional protection should be substantially reduced because "the public might reasonably perceive attorney advertising to bear the imprimatur of the entire judicial system." Petitioner's Brief at 22. The absence of any evidence to support this extraordinary conjecture (which probably "rests on an underestimation of the public," *Bates*, 433 U.S. at 375) deprives it of any probative value. *See Ibanez*, 114 S. Ct. at 2089-91 (rejecting unsupported contention that the public will be misled by the word "certified" into believing that State approval exists).

Second, Petitioner resurrects the hoary "right-privilege" distinction to argue that lawyers give up their constitutional right to commercial speech when they are "granted the privilege" of serving the judicial system. Petitioner's Brief at 22-23. But even 31 years ago, it was "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a right or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Perry v. Sindermann*, 408 U.S. 593, 599 (1972). Certainly, when lawyers are outside the courtroom, and soliciting business like other

purveyors of lawful services, they cannot be deemed to have waived their First Amendment rights. *See The Florida Bar: Petition to Amend*, 571 So. 2d at 475 ("a lawyer cannot be forced to surrender all first amendment freedom as the price of practicing law" (Barket, J., concurring in part, dissenting in part)).

Further, Petitioner's "public function" analogy reaches much too far. If lawyers' commercial speech receives less constitutional protection because "the public's perception of, and confidence in, its system of justice and those who administer it is critical to the stability of a democratic society," Petitioner's Brief at 19, then lawyers' *noncommercial* speech specifically criticizing the justice system (e.g., a local bar association's rating of sitting judges) would be regulable.[9] In addition, the "public function" analogy could easily be extended to reduce commercial speech protection for all licensed professions. *See Ohralik*, 436 U.S. at 460 (holding that "the State bears a special responsibility for maintaining standards among members of the licensed professions," including opticians and dentists).

This Court has consistently protected lawyer advertising because of the same First Amendment principle that protects all commercial speech—the principle that " 'information is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed. . . .' " *Bates*, 433 U.S. at 365 (*quoting Virginia Pharmacy*, 425 U.S. at 770); *see* this Brief at

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[9] Indeed, Petitioner's melodramatic contention that lawyers are subject to greater regulation because they have been "entrusted with the performance of a critical constitutional function," Petitioner's Brief at 22, ignores reality. Most of the work performed by lawyers, and much of lawyer advertising, concerns tasks such as real estate closings and the drafting of wills, which do not directly implicate constitutional rights. Indeed, the only thing "constitutional" about personal injury litigation would appear to be its placement within the judicial system created by a State's constitution.

5-8. Indeed, the general body of commercial speech law owes much of its doctrinal basis to lawyer speech decisions. The Court has routinely cited those decisions in cases involving commercial speech other than lawyer advertising.[10] To overrule, or distinguish out of existence, the 17 years of lawyer advertising cases thus would threaten the viability of the entire commercial speech doctrine. Petitioner's unprincipled argument must be rejected.

III. PETITIONER'S RULE MEETS NONE OF THE ELEMENTS OF A REASONABLE TIME, PLACE OR MANNER RESTRICTION ON SPEECH

Petitioner's Rule does not satisfy any of the three requirements for a reasonable time, place or manner restriction on speech. The Rule does not restrict lawyer advertising (1) without regard to the content of the communication, (2) in a manner narrowly tailored to serve a significant governmental interest, (3) leaving open alternative channels for communication. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-94 (1984).

The Eleventh Circuit succinctly stated why the Rule fails the first element of the test:

> On its face the thirty-day Rule is unambiguously content-based. It applies only to letters that "concern[] an action for personal injury or wrongful death." R. 4-7.4(b)(1)(A). It is, then, the subject matter of the letter, a solicitation for a certain type of representation, that triggers application of the Rule.

McHenry, 21 F.3d at 1044; *see Metromedia,* 453 U.S. at 515 (plurality opinion).

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[10] *See, e.g., United States v. Edge Broadcasting Co.,* 113 S. Ct. 2696, 2703, 2704-05 (1993); *Edenfield,* 113 S. Ct. at 1800; *City of Cincinnati v. Discovery Network, Inc.,* 113 S. Ct. at 1513; *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 479 (1989); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.,* 478 U.S. 328, 340-41 (1986); *Bolger,* 463 U.S. at 64-65; *Metromedia,* 453 U.S. at 506 (plurality opinion); *Central Hudson,* 447 U.S. at 562-66; *Friedman v. Rogers,* 440 U.S. 1, 8-10 (1979).

In fact, by its terms the Rule applies to even more content than the Eleventh Circuit recognized because it is directed at letters that are written for the "purpose of obtaining professional employment." R. 4-7.4(b)(1). This qualification undermines Petitioner's suggestion that it could enforce the Rule without reference to content by considering only the source of the list of recipients. Petitioner's Brief at 29-30 n.10. For example, an attorney who represents the potentially liable party involved in a disaster likely would rely on that same source to identify recipients of letters seeking releases or waivers, but those letters—which do not seek professional employment—are not banned by the Rule.[11]

Ward v. Rock Against Racism, 491 U.S. 781 (1989) affords Petitioner no help. Petitioner's Brief at 30-32. In *Ward,* the restriction on speech, a sound-amplification guideline, was justified without reference to the content of amplified music. *Id.* at 791. For *Ward* to be analogous here, its ban would need to have been on amplified music with lyrics on a specific topic—a ban that no doubt would have been impermissible under the First Amendment.

Petitioner also mistakenly relies on *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986). There, a zoning ordinance that restricted the location of adult movie theatres was upheld because it was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theatres on the surrounding community [*e.g.*, crime and depressed real estate values]." *Id.* at 47-48. In contrast, Petitioner has banned certain lawyer solicitation letters because it believes the *content* of those letters—not simply the delivery of the envelopes—will disturb the personal privacy and tranquility of the recipients. *See* Petitioner's Brief at 8.

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[11] Moreover, serious due process issues are raised by Petitioner's suggestion that it would sanction lawyers for violating the Rule without actually considering the content of the supposedly offending letters, but only the source of the list of recipients.

The second element necessary to a reasonable time, place or manner restriction is similar to the second and third prongs of the *Central Hudson* test. The restriction "must serve a substantial state interest in 'a direct and effective way.'" *Edenfield*, 113 S. Ct. at 1801 (citation omitted). Petitioner has not satisfied these requirements of the second element, which it ignores in its Brief, for the same reasons that it has not met its comparable burden under *Central Hudson*. *See* this Brief at 9-15.

As to the third element, Petitioner has not demonstrated that its Rule leaves open alternative channels for lawyers to communicate with recent accident victims. If, as Petitioner claims, all such potential clients are consumed by their grief, they are unlikely to be reading advertisements in newspapers or yellow pages, or listening to commercials on radio or television. The only way to communicate effectively with recent accident victims (other than banned in-person solicitation) is through the "more efficient" medium of targeted direct mail. *Shapero*, 486 U.S. at 473. There is simply no reasonable alternative for plaintiffs' lawyers, *see Metromedia*, 453 U.S. at 516 (plurality opinion), particularly since the Rule leaves the "other side" to potential litigation involving the recipient with unrestricted and immediate written, and even in-person, access.

Petitioner closes this section with a familiar refrain—that if it has not satisfied the "reasonable time, place or manner" test, then "it is difficult to conceive of a type of attorney solicitation regulation that would qualify." Petitioner's Brief at 33. Petitioner apparently has forgotten the decision in *Ohralik*, which upheld a prophylactic ban on in-person solicitation by lawyers. 436 U.S. 447. More importantly, the "time, place or manner" test, like the *Central Hudson* test, is not supposed to be easily met given the basic freedoms at stake. Petitioner cannot blame the First Amendment for its own failure of proof.

CONCLUSION

Rule 4-7.4(b) is a content-based regulation of truthful, non-misleading commercial speech. It is impermissible because Petitioner has not met its burden of proof under the standards established in *Central Hudson*. Further, Petitioner has not identified a single principled basis for this Court to overrule its 17 years of decisions that uniformly have placed lawyer advertising squarely within the protection of the First Amendment applied to all forms of commercial advertising.

Respectfully submitted,

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